Supreme Court, U.S.
FILED
AUG 14 1995
CLERK

(3)

No. 95-83

In the Supreme Court

of the

United States

OCTOBER TERM, 1995

ALAN MEGHRIG and MARGARET MEGHRIG,
Petitioners,

vs.

KFC WESTERN, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE WESTERN STATES PETROLEUM ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

DONNA R. BLACK
Counsel of Record
MANATT, PHELPS & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, California 90064
(310) 312-4000
Counsel for Amicus Curiae Western States Petroleum Association

Bowne of Los Angeles, Inc, Law Printers (213) 627-2200

24 pp

TABLE OF CONTENTS

INTEREST OF THE AMICUS CURIAE 1

THE LIKELY IMPACT OF THE EXPANSION OF RCRA CITIZEN SUIT REMEDIES 2

I. SUMMARY OF ARGUMENT 4

II. ARGUMENT 5

A. The Underlying Legislative Framework 5

1. RCRA 5

2. CERCLA 7

3. Subtitle I 10

B. Effect of the Decision Below 13

1. The Creation of a New Loosely-Defined Federal Remedy by the Ninth Circuit is Unwarranted 14

2. If Allowed to Stand, the Decision Below will Significantly Impact the Workload of the District Courts 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

City of Chicago v. Environmental Defense Fund, __ U.S. ___, 114 S.Ct. 1588 (1994) 6

Key Tronic Corp. v. United States, ____ U.S.____, 114 S. Ct. 1960 (1994) 8, 9, 15

Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 (1981) 18

Washington State Dept. of Transportation v. Washington Natural Gas Co., 51 F.3d 1489 (9th Cir. 1995) 9

Wilshire Westwood Assoc. v. Atlantic Richfield Corp., 881 F.2d 801 (9th Cir. 1989) 10

Statutes

40 C.F.R. §§ 300.400 - 300.440 . . . . . 9, 14

42 U.S.C. § 6691c 11

42 U.S.C. § 6907(a)(2)(A) & (B) 9

42 U.S.C. § 6972 . . . . . 6, 7, 12, 15

42 U.S.C. § 6973 . . . . . 6, 7

42 U.S.C. § 9601(14) 10

42 U.S.C. § 9607(a) 8, 14

42 U.S.C. § 9613(g)(2) 9, 15

Ohio Admin. Code § 1301:7-7-13 12

Miscellaneous

4 W. Rodgers, *Environmental Law* § 7.6(b) (1992) 7, 13

53 Fed. Reg. 37083, 37086, 37097 (Sept. 23, 1988) 3, 17

116 Cong. Rec. 33104 (1970) (comments of Sen. Hart) 18

126 Cong. Rec. H11793-11802 (Dec. 3, 1980) 10

130 Cong. Rec. S2028, S2080 (daily ed. Feb. 29, 1984) (comments of Sen. Durenberger) 11

Calif. Leaking Underground Fuel Tank Field Manual 12

Court Ruling On Cost Recovery Under RCRA Spawns Raft of New Lawsuits, Inside EPA Weekly Report at 1-2 (May 12, 1995) 17

H.R. Rep. No. 1491, 94 Cong., 2d Sess. *reprinted in* 1976 U.S. Code Cong. & Admin. News at 1641-42 6

Oil and Hazardous Substances Liability: Hearings on H.R. 29 & H.R. 85 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 177 (1979) 10

S. Cooke, *The Law of Hazardous Waste*, § 1.02 (1995) 6

S. Cooke, *The Law of Hazardous Waste*, § 7.01(2) 10

S. Cooke, *The Law of Hazardous Waste*, § 12.01(2) 8

S. Cooke, *The Law of Hazardous Waste*, § 12.02 8

S. Cooke, *The Law of Hazardous Waste*, § 15.01(1)(a) 7

S. Cooke, *The Law of Hazardous Waste*, § 16.03 (d)(f) 7, 12, 13

S. Cooke, *The Law of Hazardous Waste*, § 17.01(1)(b) 13

No. 95-83

In the Supreme Court of the United States

OCTOBER TERM, 1995

Alan Meghrig and Margaret Meghrig,
Petitioners,
vs.
KFC Western, Inc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE WESTERN STATES PETROLEUM ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS[1]

INTEREST OF THE AMICUS CURIAE

The Western States Petroleum Association ("WSPA") is an association of 31 companies that together account for the bulk of the petroleum exploration, production, refining, transportation and marketing activities in six western states -- Arizona, California, Hawaii, Nevada, Oregon, and

[1] Written consent to the filing of this amicus brief has been obtained from both parties and separately filed with the Court.

Washington.[2] Unlike petitioners, who owned only one commercial property upon which a gas station was formerly located, WSPA's member companies own and have owned thousands of such properties. WSPA is thus well positioned to discuss the important questions raised by the Ninth Circuit's decision and the significant impact of that decision on affected parties as well as on the workload of the district courts.

If not reviewed and reversed by this Court, the Ninth Circuit decision will, for the first time, allow petroleum contamination cleanup cost recovery actions to proceed in federal court. Congress expressly excluded petroleum product cleanups from the reach of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and limited the remedies provided by the citizen suit provisions of the Resource Conservation and Recovery Act ("RCRA") to injunctive relief. As a result, actions to recover costs for cleaning up property contaminated by petroleum products have been brought exclusively in state courts pursuant to various statutory and common law theories.

THE LIKELY IMPACT OF THE EXPANSION OF RCRA CITIZEN SUIT REMEDIES

The potential impact of the Ninth Circuit's expansion of RCRA citizen suit remedies on federal district courts is staggering. A few years ago, the United States Environmental Protection Agency ("EPA") estimated that over two million underground storage tanks containing

---

[2] WSPA's members also account for the majority of these activities nationally, although WSPA focuses on activities in the six western states listed above.

petroleum products were in operation in the United States. 53 Fed. Reg. 37083 (Sept. 23, 1988). These tanks were located at over 700,000 facilities nationwide. *Id.* Based upon a study of over 10,000 tanks, EPA concluded that approximately 25 percent of those underground petroleum tanks had leaked. *Id.* at 37086. EPA also estimated that the "number of sites needing significant cleanup ... is expected to be in the *tens of thousands* nationwide." *Id.* at 37097 (emphasis added). That number is almost unquestionably higher now.

In preparation for submitting this brief, WSPA polled several of its member companies. Information was sought on the number of service stations owned by member companies and the amount of pending litigation concerning underground petroleum tanks. One company reported that it currently owned about 1,000 service station properties in the western United States and stated that it had owned over 16,000 gas station properties in that region historically. A second company reported owning about 3,000 gas stations nationwide and stated that it had owned over 9,000 gas station properties within the last 10 years. A third company reported owning about 4,000 gas stations nationwide, but could provide no historical ownership information. A fourth company reported owning over 1,000 service stations and stated that it had owned over 25,000 service station properties since the early 1900's.

These four companies also reported being named as defendants in over 1,600 actions for recovery of petroleum contamination cleanup costs brought in state courts over the past five to ten years. Approximately one-third to one-half of these cases are still pending.

Although the results of the informal survey conducted here are not definitive, a clear indication of the magnitude of

the impacts emerges when the responses are considered in light of EPA's published data. EPA reported that underground petroleum tanks were located at over 700,000 *active* facilities nationwide *in the year 1988*. Given the significant downsizing in the retail marketing end of the petroleum industry both before and after 1988, confirmed by the large number of *former* gas station properties reportedly owned by the surveyed companies, it would appear that underground petroleum tanks historically have been located at well over one million, and perhaps at several million, properties.

EPA also reported that tens of thousands of underground petroleum tank properties would require "significant cleanup." Given that just the four WSPA member companies surveyed reported being named as defendants in over 1,600 petroleum tank cleanup cases, EPA's estimate appears accurate. Extrapolating from the information obtained from WSPA members, it is a reasonable estimate that well over 10,000 underground petroleum storage tank cost recovery actions have been filed in the state courts in the past five to ten years and that several thousand such cases are currently pending.

I. SUMMARY OF ARGUMENT

The decision below would result in shifting the forum for virtually all petroleum cleanup cost recovery actions from state court to federal court. A RCRA "cost recovery" action would also create a series of inconsistencies, anomalies and uncertainties in cost recovery law. The guidelines for such a unique cost recovery action are ill-defined or undefined and create substantial uncertainty. In addition, RCRA encompasses "solid waste" as well as "hazardous waste." Thus, cost recovery actions could be brought in federal court for cleanups of a much broader universe of materials than

currently authorized under CERCLA, including petroleum, an anomalous situation. Moreover, the RCRA statute has no express limitations period, a notable inconsistency with other cost recovery statutes. Finally, the RCRA statute does have an attorney's fees provision, even though CERCLA, the touchstone cost recovery statute, does not.

II. ARGUMENT

While the industrial revolution has produced many useful benefits for society, many industrial processes and practices which were not only completely legal, but which were widely perceived to be safe and even state-of-the-art at the time, have resulted in the contamination of numerous properties across the country. This issue first arose in the 1970s and resulted in the enactment of three federal statutes: (1) the Resource Conservation and Recovery Act of 1976 ("RCRA"); (2) the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"); and (3) the underground storage tank provisions of Subtitle I of RCRA enacted as part of the Hazardous and Solid Waste Amendments of 1984 ("Subtitle I").

We will briefly review the relevant portions of RCRA, CERCLA and Subtitle I that comprised federal statutory contamination cleanup law prior to the Ninth Circuit's decision below in order to show that that decision is completely contrary to the underlying legislative framework. We will then illustrate the impacts of the decision on the federal district courts and on the petroleum industry.

A. The Underlying Legislative Framework

1. RCRA

RCRA was signed into law in October 1976. The

RCRA legislation completely replaced the former Solid Waste Disposal Act with nine new subtitles, denominated A though H, addressing the management of hazardous and solid wastes. S. Cooke, *The Law of Hazardous Waste*, § 1.02 (1995) ("*Cooke*"). As this Court has noted, "RCRA is a comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and management procedures of Subtitle C" and to regulate solid waste under the "much ... loose[r]" procedures of Subtitle D. *City of Chicago v. Environmental Defense Fund*, __ U.S. ___, 114 S.Ct. 1588, 1590 (1994).

At the time of its passage, RCRA was viewed as closing the "last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R. Rep. No. 1491, 94 Cong., 2d Sess. *reprinted in* 1976 U.S. Code Cong. & Admin. News at 1641-42. With respect to contamination of property by solid and hazardous wastes, RCRA remains largely prospective in nature -- it is designed primarily to prevent future occurrences of property contamination.

However, two provisions of RCRA do provide a mechanism for reaching past activities that have caused property contamination: (1) the "imminent hazard" provision, 42 U.S.C. § 6973, and (2) the citizen suit provision, 42 U.S.C. § 6972. Under the imminent hazard provision, the Administrator of the EPA is authorized to file suit against any person who has contributed, or who is contributing, to the past or present handling or disposal of a hazardous or solid waste that "may present an imminent or substantial endangerment to human health or the environment." 42 U.S.C. § 6973. If the EPA finds the requisite danger present, it may seek an injunction in district court "to require that the liable parties refrain from

potentially harmful activity, and undertake any action necessary to abate the hazard." *Cooke*, § 15.01(1)(a). The EPA is also provided with authority to issue "such orders as may be necessary to protect public health and the environment." 42 U.S.C. § 6973(a).

The citizen suit provision of RCRA authorizes a citizen-plaintiff to file suit in district court against a person who has contributed, or who is contributing, to the past or present handling or disposal of a solid or hazardous waste that "may present an imminent and substantial endangerment to human health or the environment." 42 U.S.C. § 6972(a)(1)(B). The district court has jurisdiction to "restrain" a liable party, to "order such person to take such other action as may be necessary, or both." *Id.* As a leading treatise on hazardous waste law has stated, "[i]t is well settled that, under [the RCRA citizen suit provision], as is the case with the C[lean] W[ater] A[ct], an award of damages to the plaintiff is not permitted." *Cooke*, § 16.03 (d)(f); *see also*, 4 W. Rodgers, *Environmental Law* § 7.6(b) (1992).[3]

2. CERCLA

As noted above, RCRA is largely prospective in operation and regulates the handling and disposal of solid and hazardous waste. Congress recognized "that while RCRA amply addressed the management of hazardous wastes from

---

[3] In the decision below, the Ninth Circuit Court of Appeals ruled that the RCRA citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), provides for the recovery of costs expended in cleaning up hazardous waste and solid waste because the statutory language providing the district courts with jurisdiction to "order such person to take such other action as may be necessary" is broad enough to encompass not only mandatory injunctive relief but money damages in the form of recovery of cleanup costs expended.

generation through disposal, it provided *only limited authority* to clean up wastes that had been improperly disposed of." *Cooke*, § 12.02(3) (emphasis added). This, coupled with several well known incidents of environmental contamination, including particularly the Love Canal site in New York, led to the passage of CERCLA in 1980. *Id.*, § 12.02(2). CERCLA is now the "centerpiece of the federal hazardous substance cleanup and liability program." *Id.*, § 12.01(2).

CERCLA provides the federal government with "broad power to command private parties and other government agencies to clean up hazardous waste sites." *Key Tronic Corp. v. United States*, ___ U.S.___, 114 S. Ct. 1960, 1964 (1994). The federal government, generally acting through the EPA, may undertake the cleanup itself or may attempt to compel liable parties to undertake the cleanup. *Cooke*, § 12.01(2). Thus, CERCLA, which is largely retrospective in operation, provides a cost recovery mechanism pursuant to which the federal government may file suit in district court to recover its cleanup expenses from liable parties. 42 U.S.C. § 9607(a).

The CERCLA cost recovery cause of action is also available to private party plaintiffs who effectuate a cleanup. CERCLA provides that:

> "[A]ny person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of
>
> * * *
>
> shall be liable for --
>
> (A) all costs of removal or remedial action

> incurred by the United States Government or a State or an Indian Tribe not inconsistent with the National Contingency Plan; [or]
>
> (B) any other necessary costs of response *incurred by any other person* consistent with the National Contingency Plan.

42 U.S.C. § 6907(a)(2)(A) & (B) (emphasis added).

By providing a private party cost recovery cause of action, CERCLA allows owners of property contaminated with hazardous substances to clean up their property and then seek recovery of their cleanup expenses in the federal courts, from liable parties under CERCLA. Former owners or lessees of contaminated property are typical defendants in a CERCLA private party cost recovery action.

There are, however, some restrictions on the recovery of cleanup costs in these cases. First, the costs incurred must be consistent with the National Contingency Plan ("NCP"). *Washington State Dept. of Transportation v. Washington Natural Gas Co.*, 51 F.3d 1489 (9th Cir. 1995). The NCP contains detailed procedures on how cleanups are to be conducted and covers nearly thirty pages in the Code of Federal Regulations. 40 C.F.R. §§ 300.400 - 300.440. Second, an action must be brought within the statutory limitations period. 42 U.S.C. § 9613(g)(2). Third, attorney's fees are not recoverable in a CERCLA cost recovery action. *Key Tronic Corp. v. United States*, *supra*, 114 S. Ct. 1960.

Finally, there is no cost recovery under CERCLA for cleanup of petroleum product contamination, but only for cleanup of "hazardous substances." The term "hazardous substance" is defined in CERCLA and explicitly "does not

include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance" elsewhere in CERCLA. 42 U.S.C. § 9601(14); *Wilshire Westwood Assoc. v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989).[4]

3. Subtitle I

The Hazardous and Solid Waste Amendments of 1984 were the first federal enactments to address underground petroleum storage tanks. Pub. L. No. 86-616, 98 Stat. 3221-93 *codified at* 42 U.S.C. §§ 6991 - 6991i. This legislation created Subtitle I of RCRA (not the subject of the pending writ petition) which directed the EPA to establish regulations for leak detection and cleanup of contamination at existing tanks and to establish standards for the installation and operation of new tanks. *Cooke*, § 7.01(2).

The legislative history of Subtitle I offers a noteworthy analysis of the reasons why it was enacted:

> Underground storage tanks are seldom regulated. At present [1984], Federal

---

[4] This definitional exclusion is commonly referred to as the "CERCLA petroleum exclusion." Early subcommittee testimony on the CERCLA legislation evinced Congressional awareness that petroleum contamination posed less of a threat to public health than those chemicals that later came to be defined as "hazardous substances." *Oil and Hazardous Substances Liability: Hearings on H.R. 29 & H.R. 85 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 177 (1979). The legislative debates on the final compromise language of CERCLA indicated that Congress intended to enact subsequent legislation on petroleum contamination. *See* 126 Cong. Rec. H11793-11802 (Dec. 3, 1980).

> regulation of storage tanks covers only above-ground tanks containing chemical wastes. And, if a tank is leaking, the Federal Government cannot under [CERCLA] authority respond or clean up a spill if it involves petroleum products.
>
> * * *
>
> The tank storage of one of the most common underground contaminants -- gasoline -- is unregulated because it is not a waste product (and thus not governed under the authority of [RCRA]) and spills of the fuel cannot be cleaned up under [CERCLA] because it is a petroleum product.
>
> 130 Cong. Rec. S2028, S2080 (daily ed. Feb. 29, 1984) (comments of Sen. Durenberger).

Congress provided a mechanism in the Subtitle I legislation for the states to enact their own legislation and to adopt regulations governing underground petroleum tanks that would supersede the federal legislation and regulations. 42 U.S.C. § 6691c. Prodded by Subtitle I, virtually all states have adopted laws and promulgated regulations governing underground petroleum tanks. In practical terms, this means that a party installing, operating or cleaning up contamination from a tank only refers to applicable state laws and regulations in conducting its activities. These activities are generally regulated and overseen by state agencies that have been delegated these duties by state statute. It is critical to note, however, that *Subtitle I provides no cost recovery cause of action in favor of parties who expend costs cleaning up petroleum contamination from underground tanks.*

In sum, then, the federal statutory framework governing property contamination litigation is as follows: (1) RCRA is largely designed to prevent future contamination problems, and is limited to injunctive relief only. (2) CERCLA provides authority for the cleanup of past incidents of contamination, and allows a private party who cleans up "hazardous substance" contamination (not by petroleum products) to recover its costs in federal court pursuant to the CERCLA cost recovery cause of action. (3) Petroleum contamination is addressed by state agencies pursuant to state laws and regulations.[5] These state programs were encouraged by federal Subtitle I legislation, which itself provided no cost recovery cause of action.

Because of CERCLA's petroleum exclusion, parties who clean up property contaminated by petroleum from an underground tank cannot bring a CERCLA cost recovery action in federal court. Neither can parties who clean up petroleum contamination on their property bring a cost recovery action in federal court pursuant to Subtitle I because Subtitle I does not provide for such a cause of action. And, until the Ninth Circuit's decision in *KFC Western, Inc. v. Meghrig*, it was well settled that such parties could not bring a cost recovery action in federal court under the RCRA citizen suit provision, 42 U.S.C. § 6972, because only injunctive relief was available under that provision.[6] *Cooke*,

---

[5] Many states have detailed and complex formulae set forth in regulations and guidance documents to determine how clean is clean. *E.g.* Ohio Admin. Code § 1301:7-7-13; Calif. Leaking Underground Fuel Tank Field Manual.

[6] The RCRA citizen suit provision authorizes a citizen-plaintiff to obtain a prohibitory injunction to halt on-going contamination or a mandatory injunction to compel abatement of (continued...)

§ 16.03(d), (f); 4 Rogers § 7.6(b). However, in large part because of Subtitle I, parties seeking monetary damages in these circumstances had available to them a full array of state common law and statutory causes of action in state court.[7]

B. Effect of the Decision Below

The decision below, if not reviewed and reversed by this Court, will significantly alter the above-described legislative framework. This, in turn, will result in a series of inconsistencies, anomalies and uncertainties in the law of hazardous substance and petroleum contamination cleanup. In addition, of course, the creation of a new federal remedy in an area as active as petroleum contamination cost recovery

---

[6](...continued)
existing contamination. This provision applies to both hazardous waste and solid waste. Solid waste arguably includes petroleum contamination. However, the relief available is limited to injunctive relief. Cost recovery is not expressly provided for in the RCRA citizen suit provision.

[7] A leading treatise in the area has noted that "[i]n the absence of federal or state statutes creating private causes of action, private suits involving damage to... property [from contamination] are brought under common law tort principles." *Cooke*, § 17.01(1)(b). Because of the CERCLA petroleum exclusion, lack of a cost recovery cause of action under Subtitle I and the limitation of RCRA citizen suits to injunctive relief, all actions to recover costs expended in cleaning up petroleum contamination have been brought in state court. Although additional causes of action may be available in some jurisdictions under certain factual situations, most petroleum contamination cases proceed under three common law causes of action -- trespass, nuisance and negligence.

cannot help but significantly impact the workload of the federal district courts.

1. The Creation of a New Loosely-Defined Federal Remedy by the Ninth Circuit is Unwarranted

In ruling that the RCRA citizen suit provision allows plaintiffs to recover costs expended in cleaning up hazardous wastes or solid wastes, the Ninth Circuit has created a new federal remedy. Because this "citizen suit cost recovery action" was never intended by Congress, it is ill-defined and does not mesh with the existing statutory structure.

For example, RCRA provides no standards for determining which costs expended by a plaintiff are recoverable in a citizen suit cost recovery action. In contrast, under CERCLA, a private party can recover only costs that are necessary and consistent with the National Contingency Plan. 42 U.S.C. § 9607(a). The NCP contains detailed procedural requirements intended to ensure that cleanups are well designed, well implemented and cost effective. 40 C.F.R. §§ 300.400 - 300.440. The lack of such standards under RCRA is anomalous given the Congressional prescription for such standards under CERCLA. Further, this lack of standards is strong evidence that Congress did not intend the RCRA citizen suit provision to be a cost recovery mechanism. If the decision below is allowed to stand, the federal courts will need to engage in extensive interstitial lawmaking to define which costs are recoverable under a RCRA citizen suit cost recovery action. Substantial uncertainty over the proper standards to apply in evaluating costs incurred will prevail until sufficient case law develops.

RCRA provides no statute of limitations for citizen suit cost recovery actions. Again, in contrast, CERCLA

provides an express statute of limitations for cost recovery actions. 42 U.S.C. § 9613(g)(2). The lack of a statute of limitations under RCRA is also strong evidence that Congress did not intend the RCRA citizen suit provision to act as a cost recovery mechanism. If the decision below is allowed to stand, the district courts will be required to resolve this issue as well, and substantial uncertainty and unevenness of decisions will exist for some time.[8]

WSPA is aware of petroleum contamination cost recovery cases that are currently being brought under the RCRA citizen suit provision for cleanups that were completed a half dozen or more years ago. This new situation contrasts sharply with the law prior to the decision of the Ninth Circuit when well understood state statutes of limitations for tort actions controlled.

The RCRA citizen suit provision expressly provides that attorney's fees may be awarded to the prevailing party. 42 U.S.C. § 6972(e). It is a long-standing American rule of law that attorney's fees are not recoverable. *See, Key Tronic*, *supra*, 114 S.Ct. at 1965. Attorney's fees are not recoverable in private party CERCLA cost recovery actions, nor are attorney's fees generally recoverable in cost recovery cases brought under state common law theories. In all likelihood, Congress decided to allow an attorney's fees award in the context of the RCRA citizen suit provision due

---

[8] The Ninth Circuit's opinion below has suggested that the doctrine of laches "will alleviate any unfairness that might be created by the lack of a limitations period under RCRA." Pet. App. at A9. This suggestion is troubling both because it will encourage stale claims and because it injects tremendous uncertainty into the law, whereas contamination cases brought in state courts have well-settled limitation periods.

to the limited nature of the relief Congress was providing -- prohibitory and mandatory injunctive relief.

If the Ninth Circuit's ruling is allowed to stand, several anomalies will be created. Attorney's fees will be recoverable in a federal "cost recovery" action brought under RCRA, but not under CERCLA. Thus, CERCLA -- the statute designed to address the less numerous but potentially more dangerous hazardous substance sites -- will provide a less comprehensive remedy, from a plaintiff's perspective, than the RCRA citizen suit provision. The end result is clear: all parties seeking cost recovery for any type of contamination cleanup will bring a RCRA citizen suit action instead of, or in addition to, a CERCLA claim in an effort to recover attorney's fees. And, because attorney's fees would be recoverable in federal court under RCRA, petroleum "cost recovery" actions will be brought in federal court instead of in state court where attorney's fees are not recoverable.

Further, the movement of underground petroleum storage tank cleanup litigation from state to federal courts would be an unfortunate development because the state courts are the more logical forum for resolution of these disputes. As noted above, virtually all states have passed laws and promulgated regulations governing underground petroleum tanks. Accordingly, regulatory decisions regarding underground tanks generally occur at the state level. Determinations as to whether a tank cleanup was done properly, cost-effectively and in a timely manner, and whether the level of cleanup satisfies applicable standards are all questions of state law.

State courts have been deciding tank cleanup cases for a decade, and a body of case law, based on common law tort concepts, has developed. The state common law courts of general jurisdiction are ideally suited to resolve disputes of

this nature by applying general rules of decision to the facts of the cases before them. In addition, the respective obligations of current and former lessees and landowners that are at the center of most underground petroleum tank cleanup cases are matters historically determined by state law.

2. If Allowed to Stand, the Decision Below will Significantly Impact the Caseload of the Federal District Courts

As previously described, the EPA has estimated that, a few years ago, over two million underground petroleum tanks were in operation at over 700,000 facilities nationwide. 53 Fed. Reg. 37083 (Sept. 23, 1988). EPA has estimated that 25 percent of these tanks have leaked. *Id.* at 37086. Thus, approximately 175,000 properties nationwide may have been contaminated by operation of underground petroleum tanks.

As a result of the Ninth Circuit's decision, plaintiffs will be highly motivated to bring petroleum cost recovery suits in federal court under RCRA because of the possibility of recovering attorney's fees. In addition, plaintiffs who are barred from proceeding in state court on statute of limitations grounds will file in federal court where an uncertain, but potentially much longer, limitations period may apply. The end result will be that virtually all underground tank litigation will shift to federal court. As noted by Petitioners, this trend may have already begun. Pet. at 22-23 *citing Court Ruling On Cost Recovery Under RCRA Spawns Raft of New Lawsuits*, Inside EPA Weekly Report at 1-2 (May 12, 1995) (quoting industry spokespersons predicting that "hundreds" of underground petroleum tank cases will soon be filed in the district courts of the Ninth Circuit alone).

It would be ironic if the construction placed upon the RCRA citizen suit provision by the Ninth Circuit resulted in unduly burdening the federal courts. Congress took great pains to avoid just this result when it adopted the first environmental citizen suit provision 25 years ago. This is clearly indicated in Congressional debates such as the following:

> "It has been argued, however, that conferring additional rights on the citizen may burden the courts unduly. *I would argue that the citizen suit provision of [this bill] has been carefully drafted to prevent this consequence from arising*. First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. *It will be the rare, rather than the ordinary, person, I suspect, who with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill.*"
>
> 116 Cong. Rec. 33104 (1970) (comments of Sen. Hart) *quoted in Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 n.27 (1981) (emphasis added).

The Ninth Circuit's decision takes this very precise indication of legislative intent -- and over a decade of judicial decisions which have adhered to it -- and stands them on their head. Such an arbitrary and ill-founded construction of the law should not be countenanced by this Court.

CONCLUSION

If left to stand, the Ninth Circuit's decision below will work a massive disruption of well-settled principles of federal environmental law and underground petroleum tank litigation. The federal courts will be inundated with new cases better brought in state court, contrary to clearly expressed Congressional intent. Those subject to cost recovery actions under RCRA, which will in some cases involve WSPA member companies, will be subject to a myriad of uncertainties in the litigation process. For these reasons, WSPA respectfully urges this Court to issue the Writ of Certiorari sought by the petitioners.

Dated: August 11, 1995.

Respectfully submitted,

Donna R. Black
Counsel of Record
MANATT, PHELPS & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, California 90064
(310) 312-4000
Counsel for Amicus Curiae Western States Petroleum Association